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In The

SUPREME COURT of the UNITED STATES

October Term, 1969

No. 500

ARNOLD GROVER SCHMEAR, PETITIONER

v.

JOHN R. GAGNON, Warden
Wisconsin Correctional Institution

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARNOLD GROVER SCHMEAR,

Petitioner

THE GILMAN PRESS, INC., MADISON, WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Arnold Grover Schmear, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 27, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the U. S. District Court for the Western District of Wisconsin, printed in appendix B, infra, p. 2, is reported in 276 F. Supp. 4. The opinion of the U. S. Circuit Court of Appeals for the Seventh Circuit, printed in appendix B, infra, p. 6, will be reported in the Federal Reporter (citation presently unknown).

JURISDICTION

The judgment of the U. S. Circuit Court of Appeals for the Seventh Circuit was entered on May 27, 1968. On June 28, 1968, the Circuit Court of Appeals extended the time for filing a petition for rehearing to and including July 19, 1968. Pursuant to such extension, a petition for rehearing was timely filed. The petition was denied on August 13, 1968. The jurisdiction of the U. S. Supreme Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner was denied his constitutional rights under the Fourth and Fourteenth Amendments when he was arrested pursuant to a warrant issued by a district attorney and evidence seized pursuant to such arrest was introduced into evidence at his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments IV and XIV.

STATEMENT

On July 26, 1967, petition for a writ of habeas corpus was filed in the U. S. District Court for the Western District of Wisconsin. The petitioner contended that his arrest warrant was constitutionally defective because it had been executed by a district attorney and not by a neutral

and detached magistrate. The petitioner also contended that evidence seized pursuant to the invalid arrest should not have been introduced at his trial. The arrest occurred in November, 1963 and the trial was held in August, 1964.

The U. S. District Court determined that the petitioner had exhausted the remedies available in the Courts of the State of Wisconsin as required by 28 U. S. C. 2254. A response to the petition was filed and oral argument was had to the U. S. District Court, the Hon. James E. Doyle presiding.

On November 7, 1967, the District Court entered its order granting the writ. Execution of the writ was stayed for 30 days to allow the respondent time in which to file a notice of appeal. An appeal was timely made to the U. S. Circuit Court of Appeals for the Seventh Circuit. The petitioner is presently at liberty on bail.

Briefs were filed and argument heard before the U. S. Circuit Court. On May 27, 1968, the U. S. Circuit Court entered its judgment reversing the judgment of the U. S. District Court. On June 28, 1968, the Circuit Court of Appeals extended the time for filing a petition for rehearing to and including July 19, 1968. Pursuant to such extension, a petition for rehearing was timely filed. The petition was denied on August 13, 1968.

REASONS FOR GRANTING THE WRIT

In 1963 the petitioner was arrested pursuant to an arrest warrant issued by a district attorney. Evidence seized at the time of the arrest was introduced at the trial. The Wisconsin Court later determined that petitioner's failure to object to the introduction of this evidence was not a strategic maneuver. (See decision of U. S. District Court, Appendix B, infra, p. 3-b).

Following his conviction, the petitioner petitioned the Wisconsin Supreme Court for a writ of habeas corpus. The petitioner contended that the evidence seized pursuant to the arrest warrant was inadmissible at trial because the arrest had been invalid. *State ex rel. Schmear v. Gagnon* (1967) 35 Wis. (2d) 447, 151 N. W. (2d) 20. (See decision of state court, Appendix B, infra, p. 19-b.) The petition was denied. The denial was based on the state court's refusal to hold that the petitioner's rights under the Fourth and Fourteenth Amendments had been violated. In so holding, the Wisconsin Supreme Court refused to apply its previous ruling in *State ex rel. White v. Simpson* (1965), 28 Wis. (2d) 590, 137 N. W. (2d) 391, to the petitioners case. (See decision of state court, Appendix B, infra, p. 12-b.)

The U. S. Circuit Court of Appeals for the Seventh Circuit, on the appeal from the U. S. District Court, adhered to the ruling set forth in *State ex rel. Schmear v. Gagnon* (1967), 35 Wis. (2d) 447, 151 N. W. (2d) 20. (See decision of U. S. Court of Appeals, Appendix B, infra, p. 8-b.) Thus, the Circuit Court of Appeals ruled that the petitioner had not been denied his constitutional rights when evidence seized pursuant to an invalid arrest was introduced at the trial.

The U. S. Supreme Court has determined that arrest warrants are to be issued by neutral and detached magistrates. *Giordenello v. United States* (1958), 357 U. S. 480, 78 Sup. Ct. 1245; *Johnson v. United States* (1948), 333 U. S. 10, 68 Sup. Ct. 367. A district attorney is not a neutral and detached magistrate. *Mancusi v. De Forte* (1968), — U. S. —, 88 Sup. Ct. 2120, *United States v. Katz* (1967), 389 U. S. 347, 88 Sup. Ct. 507, *Giordenello v. United States* (1958), 357 U. S. 480, Sup. Ct. 1245.

The issuance of the petitioner's arrest warrant was clearly a violation of the Fourth and Fourteenth Amendments as previously interpreted by the U. S. Supreme Court. *Giordenello v. United States* (1958), 357 U. S. 480, 78 Sup. Ct. 1245; *Johnson v. United States* (1948), 333 U. S. 10, 68 Sup. Ct. 367. When the petitioner was arrested his then existing constitutional rights were violated, and, the evidence seized pursuant to the arrest should have been excluded. *Ker v. California* (1963), 374 U. S. 23, 83 Sup. Ct. 1623; *Mapp v. Ohio* (1961), 367 U. S. 643, 81 Sup. Ct. 1684. Thus, the U. S. Circuit Court of Appeals for the Seventh Circuit erred when it held that the petitioner's constitutional rights had not been violated.

A determination as to whether the U. S. Circuit Court of Appeals erred when it ruled that petitioner's constitutional rights had not been violated is clearly in the public interest. A decision by this Court is required in order to settle vital questions of due process arising as the result of previous U. S. Supreme Court rulings. The public interest further requires that this Court resolve the all important question as to the application of its rulings in the

Johnson case and the *Giordenello* case to proceedings in the state courts of Wisconsin.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARNOLD GROVER SCHMEAR

Petitioner